RECORD AND BRIEF

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No. 15-1194

IN THE
Supreme Court of the United States

LESTER GERARD PACKINGHAM,
Petitioner,

v.

NORTH CAROLINA,
Respondent.

On Writ of Certiorari to the
Supreme Court of North Carolina

BRIEF *AMICI CURIAE* OF THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS AND THE THOMAS JEFFERSON CENTER FOR PROTECTION OF FREE EXPRESSION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media. The Reporters Committee has provided assistance and research in First Amendment and Freedom of Information Act litigation since 1970.

Located in Charlottesville, Virginia, the Thomas Jefferson Center is a nonprofit, nonpartisan institution whose sole mission is the protection of the First Amendment rights of free speech and free press. Since its founding in 1990, the Center has pursued its mission in a variety of ways, including the filing of amicus curiae briefs in federal and state courts across the country.

As organizations dedicated to protecting the First Amendment interests of the news media, *amici* have an interest in ensuring that the public can access news without government interference.

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[1] Pursuant to Sup. Ct. R. 37, counsel for *amici curiae* state that no party's counsel authored this brief in whole or in part; no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief; no person other than the *amici curiae*, its members or its counsel made a monetary contribution intended to fund the preparation or submission of this brief; and written consent of all parties to the filing of the brief has been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

N.C. Gen. Stat. § 14-202.5 violates the First Amendment because it restricts access to news websites. But while *amici* support Petitioner's argument that this particular law interferes with his First Amendment rights, we write to emphasize how any regulation that directly targets online speech and social media, and therefore the ability to receive news, affects the constitutional rights of the media and of citizens themselves to participate in the full range of informed civic engagement.

The North Carolina Supreme Court indicated that the statute applies to news websites such as www.nytimes.com, and the plain language of the statute supports such a reading. Such a statute is incompatible with the First Amendment rights of both the news media generally and the individuals covered by the statute. Laws that directly target the communication of news and information must be subject to the strictest scrutiny.

Statutes that seek to restrict content in this manner substantially burden the news media's ability to disseminate information in an effective manner. They do so by restricting the number of readers who may access and pay subscription fees to the news website and by limiting the reach of news stories that are increasingly delivered to readership through social media platforms such as Facebook. Any law that targets such a broad range of online news consumption raises serious First Amendment concerns, regardless of the underlying governmental interest, in this case the protection of minors.

ARGUMENT

I. Laws Restricting Access to News Websites Infringe on the First Amendment Right to Receive Information.

Any law that restricts a reader's ability to access news websites affects the constitutional rights of the reader and the news media. The First Amendment protects the right of the reader to receive information and ideas from the news media both as an extension of the news organizations' own First Amendment right to disseminate information and as a necessary predicate to the reader's ability to exercise the First Amendment rights of speech and civic engagement. The broad sweep of the North Carolina law has a substantial effect on these First Amendment rights.

A. The North Carolina Supreme Court Has Opened the Door to Applying § 14-202.5 to Restrict Access to News Websites.

A plain reading of the North Carolina law in question suggests that registered sex offenders in North Carolina may not access certain for-profit newspaper, TV news and radio news websites. The statute makes it unlawful for a registered sex offender to access a "commercial social networking Web site where the sex offender knows that the site permits minor children to become members." N.C. Gen. Stat. § 14-202.5(a)–(b). But the definition of "commercial social networking Web site" is so broad as to capture nearly every major media website containing a comment section and allowing minor users, including *The New York Times*, *The Washington Post*, and *The Wall Street Journal*. *Id.* Specifically, a website

constitutes a "commercial social networking Web site" if it allows minors to become members and if it:

> (1) Is operated by a person who derives revenue from . . . the Web site.
>
> (2) Facilitates the social introduction between two or more persons for the purposes of friendship, meeting other persons, or information exchanges.
>
> (3) Allows users to create Web pages or personal profiles that contain information such as the name or nickname of the user, photographs placed on the personal Web page by the user, other personal information about the user, and links to other personal Web pages on the commercial social networking Web site of friends or associates of the user that may be accessed by other users or visitors to the Web site.
>
> (4) Provides users or visitors to the commercial social networking Web site mechanisms to communicate with other users, such as a message board, chat room, electronic mail, or instant messenger. N.C. Gen. Stat. § 14-202.5(b).

News websites appear to satisfy the four requirements of § 14-202.5(b) as they (1) generate advertising revenue; (2) facilitate the exchange of information in the form of commenter opinions; (3) allow (and often require) commenters to create personal profiles that contain names or nicknames; and (4) have mechanisms designed for discussion between commenters.

The Court of Appeals of North Carolina found that the statute's ban is "much more expansive" than merely prohibiting access to "mainstream social networking sites such as Facebook.com and Myspace.com," extending potentially even to "sites such as Google.com and Amazon.com because these sites contain subsidiary social networking pages." *State v. Packingham*, 229 N.C. App. 293, 302, 748 S.E.2d 146, 153, *review allowed, writ allowed, appeal dismissed*, 367 N.C. 256, 749 S.E.2d 842 (2013), *and rev'd*, 368 N.C. 380, 777 S.E.2d 738 (2015).

The North Carolina Supreme Court did not dispute that the statute could apply to news websites. It found that a website that requires "no more than a username and an email address to reach the page does not *necessarily* violate the statute," but certainly "a site that generates or creates a Web page or a personal profile for the user and otherwise meets the requirements of the statute is prohibited." *State v. Packingham*, 368 N.C. 380, 390 (2015) (emphasis added). The court went on to conclude that constitutionally adequate substitutes existed for news websites such as nytimes.com and provided as one example WRAL.com, NBC's local news affiliate. *Id.* This news website fell outside of the statute's ban, according to the court, because it requires users to be at least eighteen years old — not because it is a news website. *Id.*; *see also id.* at 400 (Hudson, J., dissenting) ("[T]he statute also likely includes . . . even news sites.").

The State's Brief of Opposition argues that the news media site "nytimes.com is not covered by the statute because the site does not allow for creation of detailed personal user pages that link to other users'

personal pages . . ." Opp. 30, 31. This characterization of subsection (b)(3) is incorrect for two reasons. First, subsection (b)(3) has no "detail" requirement; it only requires that the website's users can create Web pages or profiles that contain some information. The website nytimes.com allows users to create "profiles" containing name, location, and a photo, and the website alerts users: "Your profile is public. It will appear with any comments you leave on NYTimes.com." This information satisfies the (b)(3) requirements. Second, the Brief in Opposition's argument is based on a faulty reading of the conjunctive "and" in subsection (b)(3), which leads the State to claim that (b)(3) contains two independent requirements: a personal profile *and* the ability to link user pages. Opp. 30 n.8. In fact, the State argues that "[t]he function of linking to other users' pages is *the hallmark* of a social networking site" under the purview of the statute. *Id.* (emphasis added).

The State, however, overlooks the controlling phrase "such as" earlier in the same sentence, which indicates that the ability to link to other users' pages is just one of several examples of information contained in a personal profile of a "commercial social networking Web site"; creating a user nickname, disclosing personal information such as location, or uploading a user photograph are similarly sufficient but not necessary to satisfy the subsection. This reading is also consistent with the structure of the statute. If, as the State claims, linking user pages is a separate, independent requirement of a "commercial social Web site," the statute would have been drafted to include five, rather than four, subsections.

Judge Hudson of the North Carolina Supreme Court confirmed this reading of subsection (b)(3) in a dissenting opinion: "[T]he statute's description of a 'personal profile [ ],' and the language 'such as' when referring to the information that can appear in such profiles, could bring within the statute's scope many websites that allow users to register by going through the minimal process of creating a username and adding an email address or telephone number. . . . [T]he statute [ ] likely includes . . . even news sites like the websites for *The New York Times* and North Carolina's own *News & Observer*." *Packingham*, 368 N.C. at 400 (Hudson, J., dissenting). The majority opinion did not dispute that news websites could fall under subsection (b)(3), making the resolution of this case in a way that protects the information access rights of readers of considerable importance to *amici*.[2]

B. The First Amendment Protects the Right of Readers to Receive Information and Ideas.

As the Supreme Court has repeatedly affirmed, it is "well established that the Constitution protects the right to receive information and ideas. 'This

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[2] Even assuming, for the sake of argument, the statute does not apply to news websites, the ambiguity forces the Petitioner and similarly situated individuals to make legal determinations and risk calculations before reading news online, suggesting that the statute is unconstitutionally vague. "[A]n enactment is void for vagueness if its prohibitions are not clearly defined," *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972), and "[t]his appears to be especially true where the uncertainty induced by the statute threatens to inhibit the exercise of constitutionally protected rights." *Colautti v. Franklin*, 439 U.S. 379, 391 (1979) (citing *Grayned*, 408 U.S. at 109).

freedom (of speech and press) . . . necessarily protects the right to receive [information.]'" *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (citing *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)); *see also Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("[T]he Constitution protects the right to receive information and ideas."); *United States v. American Library Ass'n, Inc.*, 539 U.S. 194, 216 (2003) (Breyer, J., concurring) (quoting *Stanley* and arguing for heightened scrutiny where a statute "directly restricts the public's receipt of information"). Furthermore, "[t]his right to receive information and ideas, regardless of their social worth, . . . is *fundamental* to our free society." *Stanley*, 394 U.S. at 564 (emphasis added).

Justice Brennan, writing for a plurality of the Court in *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853 (1982), noted that this right to receive information has been upheld in a "variety of contexts." *Id.* at 866–67. For example, in *Thomas v. Collins*, 323 U.S. 516 (1945), the Court found that a worker has the right to listen to a union organizer's speech. *Id.* at 534. In *Martin*, the Court upheld the principle that a person has the right to receive literature from others. 319 U.S. at 149. And in *Stanley*, the Court affirmed that an individual has the right to read obscene materials in his own home. 394 U.S. at 568. This right similarly extends to receiving news from news websites and receiving information contained in the comment sections of those websites. Because of this well-established First Amendment right to receive information, any statute that restricts the receipt of online news stories clearly targets core First

Amendment activity and must face the strictest scrutiny.

C. The Right to Receive Information is an Extension of the Press's First Amendment Right to Distribute News and is a Prerequisite for the Recipient's Exercise of Speech Rights and Civic Engagement.

There are two reasons why individuals have the constitutional right to listen to what others have to say. The first, as Justice Brennan laid out in *Pico*, is that "the right to receive ideas follows ineluctably from the *sender's* First Amendment right to send them." *Pico*, 457 U.S. at 867 (plurality). If news organizations want to reach readers, they have the right to have their ideas "receive[d] and consider[ed]." *Id.* (quoting *Lamont v. Postmaster General*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring)). A primary purpose of the First Amendment is to "encourage[] lively discussion, robust debate, and ultimately a better informed citizenry." Eugene Ho, *The Constitutional Right to Watch Television: Analyzing the Digital Switchover in the Context of the First Amendment*, 57 Am. U. L. Rev. 179, 215 (2007).

This First Amendment purpose is thwarted if the government "assume[s] a guardianship of the public mind through regulating the press [and] speech . . . ." *Thomas*, 323 U.S. at 545 (Jackson, J., concurring). Where a state criminally bars individuals from accessing online news, it restricts the free flow of ideas. *See Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) ("At the heart of the First Amendment is the recognition of the fundamental importance of the

free flow of ideas and opinions on matters of public interest and concern."); *Associated Press v. United States*, 326 U.S. 1, 20 (1945) ("[T]he government itself shall not impede the free flow of ideas."). As the noted First Amendment scholar Rodney Smolla put it, "without both a listener and a speaker, freedom of expression is as empty as the sound of one hand clapping." Rodney A. Smolla, *Free Speech in an Open Society* 198 (1992). In this case, restricting the rights of one category of criminal offenders to receive information from news organizations impacts news organizations' First Amendment right to write and disseminate that information to the broadest of audiences.

The second reason for recognizing a listener's right is that receiving information is "a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom." *Pico*, 457 U.S. at 867 (plurality). As the Court has noted, "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial . . . ." *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969). The right to receive information, therefore, not only exists to improve the quality and depth of public debate, but also to protect individuals' rights to "silently quarry or sample public culture for information that will enlighten, enrich, or simply entertain them." Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and A First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. Rev. 799, 800 (2006). As the Supreme Court laid out in *Stanley*, "If the First Amendment

means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds." 394 U.S. at 565. The government should not be allowed to make it a criminal offense for readers to "satisfy [their] intellectual . . . needs," *id.*, by accessing news websites.

In addition, the Supreme Court has consistently held that free discussion of governmental affairs is the core of expressive activity the First Amendment is intended to protect. "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964), as the right of "citizens to know what their Government is up to" defines "a structural necessity in a real democracy." *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171–72 (2004) (internal quotation marks omitted). Individuals who are denied access by the force of criminal law to news sites such as *The New York Times*, *The Wall Street Journal*, and *The Washington Post* are deprived of information essential to becoming well-informed citizens.

Here, the State of North Carolina has criminalized the reading of news online for a category of readers. The statute implicates the First Amendment right to receive newsworthy information by interfering with the ability of these readers to access information made available to the general public by the nation's news media.

II. Content-Restrictive Laws Like North Carolina's Statute Prevent News Organizations from Ensuring That Works of Journalism Effectively Reach Readers.

Beyond their First Amendment implications, laws that restrict access to content impose practical burdens on the dissemination of meaningful journalism, because the contemporary model of journalism depends on online readership and engagement, often through social media. In addition, the unique nature of journalistic content means that one website cannot serve as an adequate substitute for another, and so such restrictive laws directly limit the availability of diverse sources of journalism. Finally, laws like this one target one of the most essential methods of news dissemination today: audience engagement through social media platforms such as Facebook, Twitter, Snapchat, and Instagram.

A. Such Statutes Threaten One Contemporary Model of News Dissemination.

The North Carolina statute extends to a substantial majority of news sites and only those sites that forbid access to minors escape its regulatory prohibitions. The statute's reach is broad, given the prevalence of comment sections and the civic mission of news organizations to seek to inform audiences of all ages. It is the default, not the exception, for news organizations to allow readers to discuss and debate news articles in the comment sections. Cherilyn Ireton et al., *Do Comments Matter? Global Online Commenting Study 2016* (Oct. 2016), http://bit.ly/2hREwqb. A recent study by the World

Association of Newspapers and News Publishers report showed that "82% of those we surveyed . . . invite their readers to comment on their sites." *Id.* at 5. A sampling of the largest circulation newspapers in North Carolina shows that papers tend to allow and encourage readers to comment on news articles online. *See* www.newsobserver.com (website of The Raleigh News & Observer); www.charlotteobserver.com (website of The Charlotte Observer); www.fayobserver.com (website of the Fayetteville Observer). Additionally, each of these newspaper sites allows minors to access their websites, bringing the websites under the statute. *See News & Observer Terms of Service*, The Raleigh News & Observer, https://perma.cc/Z8LB-FLA7 (allowing online access to minors with parental consent); *Charlotte Observer Terms of Service*, Charlotte Observer, https://perma.cc/B4PH-9VKT (same); *see also Fayetteville Observer Terms of Use*, http://bit.ly/2hnWEEu (allowing access to readers who are 13 years old or older). Thus, the statute has a significant impact on where the Petitioner and similarly situated individuals can obtain news online about current events of local importance.

The statute also prohibits the Petitioner from accessing leading national news websites. The New York Times' www.nytimes.com is swept up in the list of proscribed media under the North Carolina law, as described above, but it is hardly alone. The terms of use agreements for websites hosted by *USA Today*, *The Washington Post*, and *The Wall Street Journal*, for example, allow minors to access their websites while also allowing user communication of the sort targeted by the statute. *See Terms of Service*, N.Y.

Times, http://nyti.ms/1M2gj8c (permitting access to the website to anyone older than 13 years of age); *USATODAY.com Terms of Service*, USA Today (Sept. 23, 2013), http://usat.ly/2hO10pm (permitting access to social-media features of the website to anyone older than 13 years of age); *Terms of Service*, Wash. Post (Jul. 1, 2014), http://wapo.st/2hlenMW (allowing access for anyone older than 13 years of age while requiring a Facebook account for age-verification and registration purposes); *Subscriber Agreement & Terms of Use*, Wall Street Journal (Nov. 25, 2015), http://on.wsj.com/2i3JtMX (allowing minors to purchase an online subscription with the consent of a parent or guardian).

Moreover, contemporary trends in the news industry suggest that the prohibitions such as the ones in the North Carolina law will become more problematic as news organizations shift resources to their digital products. Increasingly, American adults receive their news online. As of early 2016, only 20% of American adults often received news from print newspapers, and nearly twice as many adults (38%) received news regularly online. *See* Amy Mitchell, Jeffrey Gottfried, Michael Barthel, and Elisa Shearer, *Pathways to News*, Pew Research Center (Jul. 7, 2016), http://pewrsr.ch/29AWwzC. This trend is expected to grow, because younger audiences exhibit a clear preference for online news. About half of adults age 18 to 49 often get news online, and only 5% of 18-to 29-year-olds often get news from a print newspaper. Accordingly, news organizations increasingly need an online presence to reach an audience.

Though news organizations in many cases initially offered the public free access to articles online,

there has been a shift to digital subscriptions that allow users access to articles that are otherwise kept behind "pay walls." For example, starting in late 2012, "visitors to The [Raleigh] News & Observer website will be asked to pay after reading a limited number of articles for free." Will Huntsberry, *News & Observer Prepares Pay Wall to Charge Users for Online Access*, INDY Week (Dec. 12, 2012), http://bit.ly/2i9DHFp. Similarly, nytimes.com has increased its digital customer base to 2.5 million subscribers and other newspapers have reported significant increases in online readership. Ken Doctor, *Behind the Times' Surge to 2.5 Million Subscribers*, Politico (Dec. 5, 2016), http://politi.co/2gGK59M ("The Washington Post is up 73% from the first half of the year, and the Boston Globe told me this week of an immediate tripling [of] its digital subscription post election.").

While one purpose of a pay wall is to collect a subscription fee, consumer information gathered "through the registration process also has potential value to advertisers." Lucia Moses, *Why Publishers Struggle to Monetize Their Paywall Data*, DigiDay (Jun. 1, 2015), https://perma.cc/BW9C-EX4B. As more news moves to the Internet, any statute that seeks to impose legal restrictions access to journalistic content would create significant burdens for news organizations, threatening one contemporary business model for publishing and raising the possibility that quality reporting will decrease in response to market pressures.

B. News Consumers Do Not Have Ready Substitutes for Proscribed News Sites.

The North Carolina Supreme Court majority presumed in its ruling that although certain news sites were proscribed under the statute, "numerous alternatives . . . provide the same or similar services that defendant could access without violating N.C.G.S. § 14–202.5." *Packingham*, 368 N.C. at 390. This statement rests on the fallacy that individual news websites can be substituted for one another. In fact, news organizations, including those based in North Carolina, compete to publish and broadcast groundbreaking reporting and distinctive editorial opinions which other outlets cannot replicate. *See, e.g.*, Joseph Neff, *SEANC Executive Director Dana Cope's Spending Decisions Draw Fire*, The Raleigh News & Observer (Feb. 7, 2015), https://perma.cc/EDT5-FGJ2 (This article and a series of follow-up articles exposed corruption and a lack of oversight at a North Carolina employees' union, earning its author first-place honors for investigative reporting from the North Carolina Press Association in 2015.) Because of the unique material produced by news organizations such as *The Raleigh News & Observer* and *The New York Times*, they cannot simply be replaced by other websites.

Moreover, daily newspapers in many mid- and small-market localities play an outsized role in coverage of local governments. *Media Coverage of City Governments*, Pew Research Center (Jul. 29, 2010), http://pewrsr.ch/2h7oRBF ("In the suburbs, 75% of stories related to government came from newspapers."). It is therefore unlikely that consumers barred from accessing their local newspaper website

will have an alternative that provides comparably thorough coverage of their local city or county government.

C. Even if a Statute Merely Proscribes Access to Social Media Sites It Has a Substantial Impact on News Organizations' Ability to Reach Readers.

Even if this statute is read narrowly to exclude direct access to newspaper websites, it clearly applies to social media sites. As such, a statute like this still greatly restricts the availability of news and information.

News organizations increasingly rely on social media sites to distribute articles online and attract readers to their websites. This is a necessary adaptation of the news media, because a majority of American adults—62%—get their news on social media. *See* Jeffrey Gottfried & Elisa Shearer, *News Use Across Social Media Platforms 2016*, Pew Research Center (May 26, 2016), http://pewrsr.ch/2h6RdMm (summarizing a 2016 survey by Pew Research Center conducted in association with the John S. and James L. Knight Foundation). For example, 67 percent of U.S. adults have accounts on Facebook and 44 percent of U.S. adults receive news coverage through the site. Similarly, YouTube, which reaches nearly half of American adults, provides news to about 21% of its users, and Twitter, which has a smaller user base than these other sites (16% of American adults), still provides news to about 59% of its users. *Id.* These are not perfectly overlapping audiences, either; of those who receive news on at least one social

media site, a majority receive news from only one site—usually Facebook. *Id.* As such, Facebook is more than a place that people learn about a news story. It is, for many adults, the sole source of online news.

Facebook and similar social media sites also serve as a large referral service for news organizations to reach potential new readers, as users regularly post and click on hyperlinks posted to social media sites and are then directed to a news website. *See* Amy Mitchell et al., *The Role of News on Facebook*, Pew Research Center (Oct. 24, 2013), http://pewrsr.ch/2hOXnSA (reporting that about "two-thirds (64%) of Facebook news consumers at least sometimes click on news links"). Because of changing consumer preferences, social media sites are important platforms for the promotion and dissemination of news.

Not only does North Carolina's statute inhibit the Petitioner in his ability to obtain information on current events, it curtails significantly news organizations' ability to reach an audience to encourage informed civic debate and discussion.

CONCLUSION

For the foregoing reasons, *amici* ask the Court to overturn the ruling of the North Carolina Supreme Court and find that N.C. Gen. Stat. § 14-202.5, which restricts the receipt of news and information, violates the First Amendment.

Respectfully submitted,

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